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Alien Tort Litigation: The Road Not Taken

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FROM PROGRESSIVISM TO MODERN LIBERALISM: LOUIS D. BRANDEIS AS A TRANSITIONAL FIGURE IN CONSTITUTIONAL LAW

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INTRODUCTION

Many early-twentieth-century Progressives¹ believed that the Constitution reflected anachronistic liberal individualism and natural rights ideology.² Occasional judicial decisions that thwarted their favored reforms

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1 This Article refers to the post-*Lochner*, pre-New Deal opponents of liberty of contract, and other pre-New Deal proponents of government activism, as “Progressives,” and their ideology as “Progressivism,” with capital “Ps.” To the extent that “Progressive” is a less-than-precise descriptive term, it hopefully makes up for that lack of precision in consistency and brevity. Confusion sets in, of course, because many on the modern liberal-left choose to call themselves progressives, and refer to their preferred policies as progressive. To avoid this confusion the Article refers to those on the post-New Deal liberal left as “liberals,” and their ideology as modern “liberalism.”

2 See, e.g., WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 16 (1908) (dismissing the idea of inherent individual rights as “nonsense”); see also GEORGE W. ALGER, THE OLD LAW AND THE NEW ORDER 241–42 (1913) (“The old theory of legal equality, based upon the existence of industrial equality, finds itself in conflict with the facts of life.”); Richard T. Ely, *Economic Theory and Labor Legislation*, 9 AM. ECON. ASSOC. Q. 124, 126 (1908) (“But what has been the position of economic theory in the past with regard to labor legislation? Has it been, as popularly supposed, hostile to such legislation?”). For secondary sources discussing Progressive discomfort with the notion of individual rights, see ARTHUR A. EKIRCH, JR., THE DECLINE OF AMERICAN LIBERALISM 274 (1955); James W. Ely, Jr., *The Progressive Era Assault on Individualism and Property Rights*, 29 SOC. PHIL. & POL’Y 255, 255 (2012); William E. Forbath, *The White Court (1910–1921): A Progressive Court?*, in THE UNITED STATES SUPREME COURT 172, 175 (Christopher Tomlins ed., 2005); Herbert Hovenkamp, *The Mind and Heart of Progressive Legal Thought*, 81 IOWA L. REV. 149, 157 (1995); David N. Mayer, *The Myth of “Laissez-Faire Constitutionalism”: Liberty of Contract Dur-*

provoked them further. As a result, some Progressive intellectuals, especially those associated with the pro-labor-union political left, became overtly hostile to the Constitution.³

Even those Progressives who were more favorably inclined to the Constitution typically loathed judicial review. Progressives thought that judicial review was undemocratic and that it put too much power over public policy in the hands of non-expert judges.⁴ Leading Progressive politicians, including Theodore Roosevelt,⁵ Senator William Borah,⁶ and Senator Robert LaFollete,⁷ sought in the 1910s and early 1920s to protect Progressive legislation by limiting judicial independence and the power of judicial review.

Progressive hostility to judicial review most often manifested itself in criticism of judicial opinions blocking labor and other regulations. But with the partial, post-World War I exception of freedom of expression—which was justified by Progressives not as an individual right but as a necessity for democracy to function properly in the public interest—thinkers on the Pro-

ing the *Lochner* Era, 36 HASTINGS CONST. L.Q. 217, 219 n.12 (2009); G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1003 (1972).

3 A symptom of this hostility was the influence of a treatise by Charles Beard, which used a somewhat crude class analysis to argue that the Constitution's origins lay in the economic self-interest of the wealthy elite of the founding generation. See CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

4 See Forbath, *supra* note 2, at 176 ("Almost every prominent progressive agreed that the national Constitution had to be changed and the power of the federal courts diminished."); Johnathan O'Neill, *Constitutional Maintenance and Religious Sensibility in the 1920s: Rethinking the Constitutionalist Response to Progressivism*, 51 J. CHURCH & ST. 1, 31–32 (2009) (reviewing Progressives' attacks on the Constitution and judicial review and their advancement of direct democracy). See generally DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 129–76 (1997) (noting Progressive hostility to judicial review); GILBERT E. ROE, OUR JUDICIAL OLIGARCHY (1912) (arguing that courts have usurped the functions of the legislature and that their powers should be curtailed); TOWARD AN AMERICAN CONSERVATISM: CONSTITUTIONAL CONSERVATISM DURING THE PROGRESSIVE ERA (Joseph W. Postell & Johnathan O'Neill eds., 2013) (discussing in various conflicts the debate between conservatives and Progressives over judicial review in the Progressive era). Oddly enough, serious scholars still make the error of anachronistically assuming that belief in judicial restraint was incompatible with Progressivism. See, e.g., THOMAS HEALY, THE GREAT DISSENT 248 (2013) ("Once he was on the Court, however, [Frankfurter's] belief in judicial restraint prevailed over his progressive instincts . . .").

5 In his 1912 campaign for President, Roosevelt advocated allowing state voters to "recall" state supreme court judicial decisions that they opposed. See Theodore Roosevelt, *A Charter of Democracy: Address Before the Ohio Constitutional Convention*, OUTLOOK, Jan. 6, 1912, 390, 391. Obviously, this would be a precedent for similar federal action.

6 Borah argued that it should take a seven-to-two majority of the Supreme Court to invalidate legislation. See 64 CONG. REC. 3959 (1923) (statement of Sen. William E. Borah).

7 LaFollete, running a vigorous Progressive Party campaign in 1924, promised direct election of federal judges and enabling Congress to overturn Supreme Court decisions. See KENNETH CAMPBELL MACKAY, THE PROGRESSIVE MOVEMENT OF 1924, at 144 (1947); WILLIAM G. ROSS, A MUTED FURY 193–217 (1994); see also 62 CONG. REC. 9076 (1922) (reprinting Senator LaFollette's speech calling for a ban on lower federal courts' invalidating laws and for Congress to have the authority to overturn Supreme Court decisions).

gressive left were typically as opposed to judicial intervention on behalf of what we now call civil liberties as they were to judicial intervention on behalf of economic rights.⁸ For example, in his extremely influential book *Progressive Democracy*, Herbert Croly criticized the Bill of Rights for turning the Constitution “into a monarchy of the Law superior in right to the monarchy of the people.”⁹ Morris Cohen, meanwhile, questioned the legitimacy of using judicial authority to invalidate legislation that infringed on individual liberty.¹⁰

Leading Progressive jurists naturally tended to be less hostile to the judiciary than were Progressives who were not attorneys. Nevertheless, these jurists strongly opposed judicial invalidation of economic legislation. They also were usually at best uninterested in judicial attention to civil libertarian concerns of the sort that helped define the liberal constitutionalism of the post–New Deal period.

Edward Corwin, anticipating the victory of Progressive constitutionalism, asserted in 1934 that the “twilight of the Supreme Court” was at hand.¹¹ As Corwin predicted, the New Deal ultimately triumphed over constitutional objections and the Supreme Court stopped seriously reviewing the constitutionality of economic legislation. Leading Progressive jurists such as Hugo Black and Felix Frankfurter joined the Court, and informed observers expected that the Court’s significance in American life would fade.

Contrary to expectations, however, the Supreme Court managed to retain its former significance—and then some—by gradually dispensing with Progressive hostility to judicial review and greatly expanding constitutional protections for civil liberties and civil rights.¹² This was met with general approbation in liberal circles.¹³

8 See KEN I. KERSCH, *CONSTRUCTING CIVIL LIBERTIES* 20 (2004).

9 HERBERT CROLY, *PROGRESSIVE DEMOCRACY* 55 (1914).

10 See MORRIS R. COHEN, *The Bill of Rights Theory*, *NEW REPUBLIC*, June 17, 1925, 222, 222–23.

11 See EDWARD S. CORWIN, *THE TWILIGHT OF THE SUPREME COURT* (1934).

12 See KURT T. LASH, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 *FORDHAM L. REV.* 459, 460–65 (2001); see also LOUIS MICHAEL SEIDMAN, *Left Out*, 67 *LAW & CONTEMP. PROBS.* 23, 27 (2004) (“[B]eginning in the 1930s, and picking up momentum throughout the 1950s and 1960s, progressives abandoned scientism and anti-Lochnerism for the civil liberties position.”).

13 Some old Progressives, such as Learned Hand and Herbert Wechsler, objected. See generally LEARNED HAND, *THE BILL OF RIGHTS* 4 (1958) (“One cannot find among the powers granted to courts any authority to pass upon the validity of the decisions of another ‘Department’ as to the scope of that ‘Department’s’ powers.”); HERBERT WECHSLER, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1, 6 (1959) (“The duty, to be sure, is not that of policing or advising legislatures or executives, nor even, as the uninstructed think, of standing as an ever-open forum for the ventilation of all grievances that draw upon the Constitution for support.”). These objections, however, were met with vigorous criticism from a younger generation of liberals. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); CHARLES L. BLACK, JR., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 429 (1960); LOUIS H. POLLAK, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 *U. PA. L. REV.* 1, 7–8 (1959). The old Progressive judicial

Indeed, among jurists who considered themselves to be on the non-Communist political left, the middle of the twentieth century witnessed a dramatic shift. Mainstream opinion in these circles evolved from an often statist or at least majoritarian and anti-judicial-review Progressivism to a liberal jurisprudence that supported a much broader civil libertarianism than even Progressive civil libertarians had fathomed. The Progressives' strong aversion to a significant judicial role in American politics and government morphed into approval of strong judicial activism when it favored civil libertarianism and racial equality.¹⁴ This shift has received surprisingly little attention from scholars.¹⁵

In *Rehabilitating Lochner*, I suggested several "externalist" reasons why New Dealers abandoned the statism of their Progressive forebears in favor of civil libertarianism:

First, judicial regard for civil liberties allowed New Dealers, within and outside the Court[,] to plausibly claim that they were committed to preserving individual rights even while vastly expanding the size and scope of the federal government. And while by the 1930s the Court's liberty of contract decisions were very unpopular, its tentative forays into civil libertarianism . . . had received general public approbation. These decisions were especially popular among the ethnic and religious groups that formed the core of the New Deal coalition.

Second, judicial restraint always looks better when your side doesn't control the courts. Once the "left" took over the Supreme Court, the idea that the justices should always defer to state legislatures became far less attractive. . . .

Third, the New Deal coalition included many intellectuals with a decidedly modern liberal, as opposed to old-fashioned Progressive, ideological bent. . . .

Fourth, the enthusiasm for government activism that the New Dealers inherited from the Progressives was tempered by the rise of fascism in Europe. . . .

Fifth, the elite bar received part of its prestige from the prominent role the Supreme Court played in American life. Once it became clear that the old constitutional order based on property rights and limited government was dead, elite attorneys quickly became advocates of an expanded role for the Supreme Court in protecting freedom of expression and minority rights. . . .

restraint mantra was instead taken up by conservatives. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2 (1971).

14 See Howard Gillman, *Regime Politics, Jurisprudential Regimes, and Unenumerated Rights*, 9 U. PA. J. CONST. L. 107, 117 (2006).

15 For a recent exception, see generally Laura M. Weinrib, *The Sex Side of Civil Liberties: United States v. Dennett and the Changing Face of Free Speech*, 30 LAW & HIST. REV. 325, 328–29 (2012) (discussing how the ACLU's litigation strategy helped make support for judicial protection of freedom of speech a mainstream view on the civil libertarian left).

Finally, and for many of the reasons noted above, the Roosevelt administration encouraged the Supreme Court's emerging civil liberties jurisprudence.¹⁶

All of these factors deserve further exploration. They also need to be considered not just in light of the jurisprudence of the late 1930s and 1940s, but in light of the Warren Court's increasingly assertive civil libertarianism in the 1950s and 1960s.

In this Article, however, I will focus on an "internalist" consideration, the role Justice Louis Brandeis played as a transitional figure in writing opinions that served as a bridge between the statist Progressives of the early twentieth-century and mid-century legal liberals.

Brandeis was known as a civil libertarian in his day because he supported freedom of speech and labor union rights, which were the rights that the nascent left-leaning civil libertarian movement held most dear.¹⁷ But Brandeis was far from a consistent civil libertarian as the term has been understood since at least the Warren Court period.

Nevertheless, Brandeis was responsible for guiding the Progressive wing of the Court away from the more consistently statist, deferential-to-democratic-majorities path charted by Justice Holmes to an agenda more accommodating to libertarian and equalitarian concerns.¹⁸ As we shall see, Brandeis refused to join a draft Holmes opinion endorsing state-imposed housing segregation.¹⁹ Brandeis also declined to join Holmes's dissent in *Meyer v. Nebraska*,²⁰ a seminal due process case. Both of these decisions by Brandeis ran contrary to general sentiment in Progressive legal circles at the time. Brandeis also famously advocated strong judicial protection for freedom of speech, likely influencing Holmes in the process. Finally, despite his general support for government action to enforce Prohibition, Brandeis wrote a famous dissent in *Olmstead v. United States*²¹ that Warren Court Justices later cited to justify a variety of liberal judicial opinions.

Part I of this Article discusses Brandeis's many deviations from civil libertarianism as it came to be understood in the post-New Deal period. These deviations include his acquiescence to coercive eugenics, his general lack of interest in African American rights, his support for protective labor legislation for women and concomitant disregard for women's legal equality, his toleration of government abuses attendant to Prohibition enforcement, and his desire to repeal the Fourteenth Amendment. Part II shows that despite these deviations, Brandeis had a significantly stronger record on civil liberties as a Supreme Court Justice than one would expect from someone of his Pro-

16 DAVID E. BERNSTEIN, REHABILITATING *LOCHNER* 104–06 (2011) (footnotes omitted).

17 See Weinrib, *supra* note 15, at 385.

18 Cf. Gillman, *supra* note 14, at 117 (noting that facing a choice between Holmesian judicial restraint and Brandeis's willingness to protect fundamental rights, many liberals chose the Brandeisian path).

19 See *infra* notes 76–79 and accompanying text.

20 262 U.S. 390 (1923).

21 277 U.S. 438 (1928).

gressive outlook and background. Brandeis's votes in favor of civil liberties created a civil libertarian corpus from the Progressive wing of the Supreme Court. This prevented judicial protection of what became core civil libertarian concerns from being associated primarily with the soon-to-be-discredited "*Lochner* Court."²²

I. BRANDEIS WAS NOT A CONSISTENT CIVIL LIBERTARIAN

Not all early twentieth-century jurists with Progressive inclinations were identified with the political left. Among those who were, few had sensibilities similar to the liberal Earl Warrens and William Brennans of a later period. Progressive opposition to judicial interference with economic regulation combined with Progressivism's majoritarianism, positivism, and enthusiasm for entrusting governing matters to social science experts led Progressives to be skeptical of judicial power.²³

Progressives interested in legal matters typically determined the merit of a Supreme Court Justice primarily by how deferential his rulings were to economic regulation. Justices Brandeis and Holmes were the most consistent and persistent supporters of judicial restraint in economic matters in the pre-New Deal period, and therefore became the most admired Justices by far among the left-leaning Progressive cohort.²⁴

The epic battle over the constitutionality of New Deal legislation cemented a Manichean understanding of the Supreme Court and its Justices. The "Four Horsemen" who opposed the New Deal were deemed evil reactionaries whose jurisprudence, including their pre-New Deal jurisprudence, must be utterly discredited.²⁵ Brandeis, Holmes, and their judicial allies and successors, meanwhile, were the heroes of the story.

Brandeis's and Holmes's heroic status should have created some dissonance for the liberal left when strong judicial action on behalf of civil rights

22 I put *Lochner* Court in quotations because it's anachronistic. The notion that the pre-New Deal Court should be deemed the "*Lochner* Court" or the era deemed the "*Lochner* era" did not arise until the 1970s. See BERNSTEIN, *supra* note 16, at 108–09.

23 See *id.* at 23–24.

24 By contrast, perhaps the Justice with the most consistent pro-civil liberties and civil rights record on the Supreme Court in the pre-New Deal era was Charles Evans Hughes, who served from 1910 to 1916 and again as Chief Justice from 1930 on. Hughes, however, did not receive nearly the credit for his record on civil liberties that Holmes and Brandeis did. In part, this is likely because he missed the early free speech cases that so influenced Holmes's and Brandeis's reputations as civil libertarians. But it is likely also in part because he was much more tolerant of the majority's pre-New Deal jurisprudence than were Holmes and Brandeis. See *American Lawyers Welcomed in Historic Westminster Hall*, 10 A.B.A. J. 565, 569 (1924) (providing speech by then-ABA President Charles Hughes defending the Supreme Court from attacks by left-leaning Progressives).

25 See, e.g., RICHARD C. CORTNER, *THE WAGNER ACT CASES* 142–43 (1964); ALFRED H. KELLY & WINFRED A. HARBISON, *THE AMERICAN CONSTITUTION* 736–37 (4th ed. 1970); WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL* 143 (1963). This perspective is not entirely obsolete. See JAMES MACGREGOR BURNS, *PACKING THE COURT* 140–43 (2009).

and civil liberties became a key item on the liberal political agenda. Brandeis and even more so Holmes were not consistent supporters of what post-New Deal liberals deemed crucial civil rights and civil liberties, and the “Four Horsemen” were not consistent opponents. Indeed, some of the latter Justices had an overall record more favorable to some civil liberties than did the former.²⁶

Post-war legal scholars and commentators, however, chose to paper over the differences between the emerging liberal constitutional outlook and the views of Brandeis, Holmes, and other jurists associated with Progressivism. During the Warren Court period, Holmes and Brandeis were both widely admired on the liberal left. Indeed, despite strong evidence to the contrary, both were commonly described as consistent civil libertarians willing to use judicial power to protect individual rights. Political scientist Samuel Konefsky, for example, asserted in 1956 that “in all of the really crucial civil liberties cases, Holmes and Brandeis stood together on the side of the claimed right.”²⁷

This understanding of Holmes became increasingly discredited as later biographers described his misanthropic, Darwinian view of the world that left little room for the notion of inherent individual rights against government oppression.²⁸ Brandeis, however, is still commonly and without caveat described as a courageous civil libertarian.²⁹

26 See LUCAS A. POWE, JR., *THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008*, at 193 (2009); PHILLIPA STRUM, LOUIS D. BRANDEIS 330 (1984); Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 572–84 (1997).

27 SAMUEL J. KONEFSKY, *THE LEGACY OF HOLMES AND BRANDEIS* 261 (photo. reprint 1974) (1956); see also GLENDON SCHUBERT, *JUDICIAL POLICY-MAKING* 143 (1965) (“[B]oth Holmes and Brandeis . . . frequently argued the civil libertarian cause . . .”); Thurman Arnold, *Professor Hart’s Theology*, 73 HARV. L. REV. 1298, 1317 (1960) (singling out Holmes and Brandeis as having “restat[ed] the great principles of the Bill of Rights”). One occasionally sees similar non-caveated sentiments expressed today. See Robert W. Gordon, *How the Justices Get What They Want*, N.Y. REV. BOOKS (Dec. 8, 2011), <http://www.nybooks.com/articles/archives/2011/dec/08/how-justices-get-what-they-want> (reviewing NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES* (2011); JEFF SHESOL, *SUPREME POWER* (2010)) (“But as liberals they were also committed to free speech and civil liberties, which their heroes Holmes and Brandeis had believed that constitutional judges should protect.”).

28 See generally ALBERT W. ALSCHULER, *LAW WITHOUT VALUES* 41–51 (2001) (describing Holmes’s misanthropic outlook). Holmes revisionism goes back at least to Yosai Rogat’s work in the early 1960s, but Rogat’s articles do not seem to have quickly upset the then-prevailing consensus. See Yosai Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 3 (1962); Yosai Rogat & James M. O’Fallon, *Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*, 36 STAN. L. REV. 1349 (1984); Yosai Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213 (1964).

29 See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT* 272 (1990) (asserting that Brandeis was “sensitive to civil rights and liberties”); JOHN J. GUTHRIE, JR., *KEEPERS OF THE SPIRITS* 46 (1998) (“[Brandeis] was a longtime champion of civil liberties . . .”); MILTON R. KONVITZ, *NINE AMERICAN JEWISH THINKERS* 70 (2000) (“A major contribution of Justice Brandeis was to deepen public consciousness of the significance of civil liberties.”); SAMUEL WALKER, *PRESIDENTS AND CIVIL LIBERTIES FROM WILSON TO OBAMA* 75 (2012)

Yet Brandeis was not a consistent civil libertarian if judged by anything but the standards of the Progressive circles of his own day. Brandeis cheerfully voted to uphold some of the great abuses of government power that came before the Court. He not only joined Justice Holmes's eight-to-one majority opinion in *Buck v. Bell* upholding coercive sterilization of women deemed unfit to have children,³⁰ but apparently did so, unlike some of his colleagues, without reluctance.³¹ A year later—in his famous civil libertarian dissent in *Olmstead v. United States*, no less—Brandeis cited *Buck* favorably as an example of the Supreme Court keeping up with the times.³² And while opposition to coercive sterilization was not part of the mainstream “civil liberties” agenda of the Progressive left, Brandeis ignored significant opposition to such sterilization emanating from both within and without the judicial system.³³

During the 1920s, alcohol Prohibition and its enforcement unleashed an unprecedented wave of federal government intrusion on individual rights. Brandeis supported Prohibition and generally voted to permit enforcement even when the government engaged in dubious practices that critics argued violated citizens' rights.³⁴ Brandeis voted to allow the government to confis-

(describing Brandeis as “an active liberal and civil libertarian on the Court”); Ronald K.L. Collins & David M. Skover, *Curious Concurrence: Justice Brandeis's Vote in Whitney v. California*, 2005 SUP. CT. REV. 333, 334 (calling Justice Brandeis “the great dissenter, advocate of civil liberties, and champion of free speech”); Stephen M. Feldman, *Free Speech, World War I, and Republican Democracy: The Internal and External Holmes*, 6 FIRST AMEND. L. REV. 192, 197 (2008) (alluding to “Brandeis's strong commitment to protecting civil liberties”); Paul Finkelman, *Louis D. Brandeis*, in 7 DICTIONARY OF WORLD BIOGRAPHY 419, 423 (Frank N. Magill ed., 1999) (“On the Court, Brandeis left an unsurpassed legacy of support of civil liberties and social justice.”); Edward J. Larson, *Putting Buck v. Bell in Scientific and Historical Context: A Response to Victoria Nourse*, 39 PEPP. L. REV. 119, 125 (2011) (noting that Louis Brandeis was a “progressive proponent of civil liberties”).

Alan Dershowitz recently wrote that “the due process clause's focus on personal liberty (rather than property) [owes its] current vitality to the creative genius of Justice Brandeis.” Alan M. Dershowitz, *The Practice*, N.Y. TIMES (Sept. 25, 2009), <http://www.nytimes.com/2009/09/27/books/review/Dershowitz-t.html> (reviewing MELVIN I. UROFSKY, *LOUIS D. BRANDEIS* (2009)). As we shall see, the seminal due process personal liberty opinions were written by Justice James McReynolds, not Brandeis.

30 See *Buck v. Bell*, 274 U.S. 200, 207–08 (1927).

31 Phillip Thompson, *Silent Protest: A Catholic Justice Dissents in Buck v. Bell*, 43 CATH. LAW. 125, 126 (2004) (recounting that Chief Justice Taft told Justice Holmes that some of their colleagues were troubled by the case).

32 See *Olmstead v. United States*, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting).

33 See Stephen A. Siegel, *Justice Holmes, Buck v. Bell, and the History of Equal Protection*, 90 MINN. L. REV. 106 (2005). Several cases invalidated coercive eugenics. See, e.g., *Mickle v. Henrichs*, 262 F. 687, 690–91 (D. Nev. 1918) (voiding statute as cruel and unusual punishment); *Davis v. Berry*, 216 F. 413, 417–19 (S.D. Iowa 1914) (declaring statute unconstitutional as cruel and unusual punishment); *Williams v. Smith*, 131 N.E. 2, 2 (Ind. 1921) (holding procedural due process violated); *Smith v. Bd. of Exam'rs of Feeble-Minded*, 88 A. 963, 967 (N.J. 1913) (voiding state statute as a violation of equal protection).

34 See STEPHEN W. BASKERVILLE, *OF LAWS AND LIMITATIONS* 257 (1994); UROFSKY, *supra* note 29, at 625–26.

cate a car because a passenger was carrying a small container of whiskey,³⁵ rejected a Double Jeopardy Clause challenge to the federal government prosecuting a defendant separately for possessing and selling the same liquor,³⁶ and affirmed that the government could close distilleries without compensation.³⁷

Brandeis wrote a famous opinion in *Olmstead* taking an expansive view of the Fourth Amendment but in other cases did not take a broad view of the Amendment's protections. For example, in *Carroll v. United States*, the Supreme Court upheld a warrantless search of a car on suspicion of transporting alcohol.³⁸ The majority, including Justice Brandeis, concluded that automobiles do not get the same protection from searches as private dwellings.³⁹ Justices James McReynolds and George Sutherland dissented.⁴⁰ More generally, the latter two Justices, along with Justice Pierce Butler, were far more likely to dissent from Fourth Amendment decisions that upheld law enforcement actions challenged as unconstitutional than was Brandeis.⁴¹

Biographies of Brandeis, especially in popular sources, frequently state that he championed women's rights.⁴² In fact, Brandeis was a late and unenthusiastic convert to the cause of women's suffrage.⁴³ His famous "Brandeis brief"⁴⁴ in *Muller v. Oregon* is replete with outright sexism.⁴⁵ While Brandeis supported his own daughter's professional ambitions, he allied himself with elements of the Progressive movement that supported manifold restrictions on women's legal rights in the workplace.⁴⁶

Brandeis was perhaps a product of his times, and his views were in line with those of female reform advocates such as Florence Kelley. Like Kelley, however, Brandeis was much more interested in protective labor legislation for women as a precedent for general economic reform than with the question of whether it advanced or harmed the cause of women's rights. Brandeis therefore discounted the views of a rising generation of feminist activists

35 See *United States v. One Ford Coupe Auto.*, 272 U.S. 321, 324–25 (1926).

36 See *Albrecht v. United States*, 273 U.S. 1, 11 (1927).

37 See *Jacob Ruppert Co. v. Caffey*, 251 U.S. 264, 302–03 (1920).

38 267 U.S. 132, 162 (1925).

39 See *id.* at 153.

40 *Id.* at 163 (McReynolds & Sutherland, JJ., dissenting).

41 See POWE, *supra* note 26, at 193; STRUM, *supra* note 26, at 330.

42 See, e.g., LITA EPSTEIN, *THE COMPLETE IDIOT'S GUIDE TO THE SUPREME COURT* 93 (2004); 2 SHELLEY KAPNEK ROSENBERG, *CHALLENGE AND CHANGE: HISTORY OF THE JEWS IN AMERICA* 66 (2005); Charles R. Geisst, *Brandeis, Louis D.*, in 1 *ENCYCLOPEDIA OF AMERICAN BUSINESS HISTORY* 57, 57–58 (Charles R. Geisst ed., 2006).

43 See STRUM, *supra* note 26, at 127–31; UROFSKY, *supra* note 29, at 85–86, 363–65.

44 See generally David E. Bernstein, *Brandeis Brief Myths*, 15 *GREEN BAG 2d* 9 (2011) (discussing the mythology surrounding the brief).

45 See *id.* at 12.

46 See BERNSTEIN, *supra* note 16, at 59–60.

who argued that protective labor laws both harmed women workers and entrenched women's legal inferiority.⁴⁷

Women's legal equality was certainly not beyond his contemplation. Brandeis's Supreme Court colleague George Sutherland was a strong advocate of women's legal equality in both his pre-Court and Supreme Court careers. As a Senator, Sutherland introduced the Nineteenth Amendment in the Senate, and later helped draft the proposed Equal Rights Amendment, which Brandeis's Progressive allies strongly opposed.⁴⁸ Sutherland's opinion for the Supreme Court majority in *Adkins v. Children's Hospital* contained the strongest rhetoric favoring women's legal equality that the Court would muster for several decades.⁴⁹ Oddly, Sutherland has generally received little credit for his support of women's rights, perhaps because he has gone down in history as a "conservative" Justice. Meanwhile, Brandeis's reputation as a strong supporter of women's rights seems more a product of modern views of what an early twentieth-century Progressive *should have* stood for than of Brandeis's actual record on the subject.

With regard to the rights of African Americans, meanwhile, unlike his fellow Woodrow Wilson Supreme Court appointee, James McReynolds, Brandeis does not seem to have evinced any personal hostility to African Americans. And Brandeis privately expressed support for Felix Frankfurter's work with the NAACP. Perhaps this was because Brandeis was raised in a Jewish immigrant household by parents with liberal political views who had themselves faced ethnic discrimination in Bohemia.

Nevertheless, in general Brandeis had a "remarkable indifference to matters of race."⁵⁰ Brandeis does not, for example, seem to have used his considerable influence to object to Wilson's policy of segregating the federal workforce, a policy that was devastating to the career prospects of black civil servants.⁵¹ Brandeis later missed his most significant chance to criticize the "separate-but-equal doctrine" when he joined the Supreme Court's unanimous opinion in *Gong Lum v. Rice*.⁵²

Brandeis also privately advocated repeal of the entire Fourteenth Amendment to prevent what he saw as the misuse of the Amendment by judges skeptical of economic regulation.⁵³ He expressed no concern that such a repeal would severely diminish African Americans' opportunity to appeal to the Constitution in pursuit of legal equality, even though the Court

47 See *id.* at 58–59; David E. Bernstein & Thomas C. Leonard, *Excluding Unfit Workers: Social Control Versus Social Justice in the Age of Economic Reform*, 72 LAW & CONTEMP. PROBS. 177, 177 (2009).

48 See BERNSTEIN, *supra* note 16, at 69.

49 See *Adkins v. Children's Hosp.*, 261 U.S. 525, 539–62 (1923).

50 UROFSKY, *supra* note 29, at 639 (internal quotation marks omitted).

51 See *id.* at 640; ERIC S. YELLIN, *RACISM IN THE NATION'S SERVICE* 205–06 (2013).

52 See *Gong Lum v. Rice*, 275 U.S. 78, 87 (1927). *Gong Lum* affirmed Mississippi's policy of assigning Chinese students to "colored schools" without a hint of any discomfort by the Justices with the separate-but-equal doctrine. *Id.* at 83, 87.

53 See STRUM, *supra* note 26, at 322; Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 320.

had started to rule in favor of African American plaintiffs pursuing civil rights claims in the 1910s.⁵⁴ Felix Frankfurter, by contrast, apparently wanted to eliminate only the Due Process Clause while retaining the Equal Protection Clause.⁵⁵

Biographer Philippa Strum concludes that the “precise explanation” for Brandeis’s failure to object to the separate-but-equal doctrine “remains a mystery.”⁵⁶ Melvin Urofsky, by contrast, suggests that Brandeis “shared the attitude of most other progressive reformers, whose agenda did not include racial equality.”⁵⁷ Brandeis’s indifference to racial matters becomes even less remarkable if one recalls an additional biographical detail—Brandeis, like the President who appointed him to the Supreme Court, was a Southern Democrat who moved north as an adult.⁵⁸

Even Brandeis’s renowned support for freedom of speech is subject to some caveats. First, he had evinced little interest in freedom of expression before he joined the Supreme Court. Indeed, he was co-author of a famous article on the “right to privacy” that advocated restrictions on press freedom in the name of right of publicity.⁵⁹ Second, Brandeis’s defense of free speech was mostly instrumental, resulting from “a conviction that the exercise of free expression would in time make the public politically conscious” and favor Progressive public policy.⁶⁰

Third, and relatedly, Brandeis favored freedom of speech primarily to protect political debate. Prior generations of free speech radicals had sought broad protection for a wide range of expression.⁶¹ Few if any cases involving

54 See, e.g., *Buchanan v. Warley*, 245 U.S. 60, 82 (1917) (noting that racial discrimination is not a valid purpose to uphold a law); *McCabe v. Atchison, Topeka & Santa Fe Ry. Co.*, 235 U.S. 151, 163 (1915) (stating that a law providing for “separate but equal” but allowing trains to provide sleeping cars only to whites likely violated the Fourteenth Amendment, but dismissing a challenge to the law at issue on procedural grounds); *Bailey v. Alabama*, 219 U.S. 219, 244 (1911) (holding peonage laws a violation of the Thirteenth Amendment).

55 See Urofsky, *supra* note 53, at 318–20. Frankfurter maintained his hostility to enforcement of the Due Process Clause for many decades. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960*, at 340 n.83 (1992).

56 STRUM, *supra* note 26, at 334.

57 UROFSKY, *supra* note 29, at 640.

58 See Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 528 (2012) (describing Brandeis as “a Jeffersonian with a Southerner’s hostility to strong central government (he was from Kentucky, after all, though he was not your typical Kentuckian)”). I thank Brad Snyder for raising this point.

59 See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Neil Richards suggests that Brandeis co-authored the article with Warren reluctantly, and later came to be ambivalent about the tort theory he had embraced in the article. See Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1300–02 (2010).

60 BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 122 (2d ed. 2006); see G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 139–40 (2000).

61 On these free speech radicals, see RABBAN, *supra* note 4, at 23–87. Free speech also had its champions earlier in the nineteenth century. These advocates relied on property

non-political speech came before the Supreme Court during Brandeis's tenure, and it's not clear he would have supported judicial protection of such speech. Fourth, unlike Sutherland, Brandeis had little sympathy for businesses that asserted the right to express the owners' political point of view in the face of Progressive regulation that prohibited it.⁶²

Fifth, Brandeis had significant reservations about using the Fourteenth Amendment to limit states' infringement on freedom of speech because he believed that the Amendment did not protect substantive rights. Brandeis ultimately became an advocate of using the Amendment to protect freedom of speech, but only because he believed that if the Court was using the Fourteenth Amendment to protect economic rights, speech rights—which he thought were of far greater importance—must also be protected. In *Gilbert v. Minnesota* he wrote, "I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property."⁶³ In *Whitney v. California*, Brandeis emphasized that while it was "settled" law "that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure," he found arguments to the contrary "persuasive."⁶⁴ These opinions suggest that Brandeis "would have dutifully refused to protect the liberty of discussion [under the Due Process Clause] had conservative justices correctly refused to protect the liberty of contract."⁶⁵

Historian G. Edward White concludes that rather than being a consistent civil libertarian, Brandeis "occasionally approximated the stance of a civil libertarian," and then only to the extent that he believed that enforcing civil liberties would ultimately further the social policies he favored.⁶⁶ Even if that is an unduly ungenerous assessment, Brandeis's reputation as a consistent civil libertarian as the term has been understood in modern times is greatly exaggerated.

II. BRANDEIS AS A TRANSITIONAL FIGURE

Though Brandeis was far from a consistent civil libertarian, he had a far better record on civil rights and civil liberties than one might expect given his Progressive background. As noted previously, many Progressives, especially those on the more statist, left-wing end of Progressivism, were very skeptical of judicial intervention to protect constitutional rights. Some

rights to support their claims, which was a non-starter for Progressives like Brandeis. See MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE" 205–40, 250–55, 393–95 (2000).

62 See Samuel R. Olken, *The Business of Expression: Economic Liberty, Political Factions and the Forgotten First Amendment Legacy of Justice George Sutherland*, 10 WM. & MARY BILL RTS. J. 249, 280 n.157 (2002).

63 254 U.S. 325, 343 (1920) (Brandeis, J., dissenting).

64 274 U.S. 357, 373 (1927) (Brandeis, J., concurring), *overruled in part* by *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

65 MARK A. GRABER, TRANSFORMING FREE SPEECH 78 (1991).

66 G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 139 (3d ed. 2006).

Progressives were hostile to the very notion of individual rights against government. Justice Holmes, though not at heart a Progressive himself, was these Progressives' judicial hero. As we shall see below, Brandeis was significantly more willing than Holmes to vote to protect civil rights and civil liberties.⁶⁷ Brandeis's opinions allowed future liberal Justices to cite pre-New Deal cases he authored or endorsed as reflecting proper judicial solicitude for fundamental rights.⁶⁸

A. *The Rights of African Americans*

Justice Holmes likely had the least sympathetic record of any Justice to the rights of African Americans in the first two decades of the twentieth century, at least until James McReynolds joined the Court in 1915.⁶⁹ Holmes, for example, dissented in *Bailey v. Alabama* when the Court invalidated a law that effectively kept African Americans in a state of peonage.⁷⁰

Holmes also declined to join the majority's opinion in *McCabe v. Atchison, Topeka & Santa Fe Railway Co.*⁷¹ *McCabe* stated that the separate-but-equal principle required that African Americans be guaranteed access to the same quality of train accommodations as whites.⁷² Holmes wrote a memorandum to Chief Justice Hughes expressing his disagreement with the majority.⁷³ The memo argued that requiring train companies to supply first-class cars to African Americans only when it was economically profitable to do so constituted "logically exact equality."⁷⁴ Hughes rejoined that providing whites, but not African Americans, with the opportunity to endure a long train journey in first-class accommodations was "a bald, wholly unjustified discrimination against a passenger solely on account of race."⁷⁵

Soon after Brandeis joined the Court, the Justices heard a challenge to a Louisville, Kentucky law that required residential segregation. The challenge in *Buchanan v. Warley* alleged that the law violated freedom of contract and

67 Cf. STEPHEN M. FELDMAN, *FREE EXPRESSION AND DEMOCRACY IN AMERICA* 284 (2008) (noting that Brandeis was more concerned about civil liberties than was Holmes). This is not to say, however, that Holmes never had his moments, even outside the free speech area. In particular, Holmes vigorously opposed convictions obtained under circumstances of mob rule. See *Moore v. Dempsey*, 261 U.S. 86, 87–92 (1923) (Holmes, J.); *Frank v. Mangum*, 237 U.S. 309, 345–50 (1915) (Holmes & Hughes, JJ., dissenting); cf. *United States v. Shipp*, 203 U.S. 563, 573–74 (1906) (Holmes, J.) (permitting the Court to take jurisdiction for a contempt hearing for a sheriff who allowed a black defendant to be lynched rather than comply with an injunction).

68 See Gillman, *supra* note 14, at 117.

69 See Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622, 1642–44 (1986) (describing instances of the influence of race on the decisions of Justice Holmes).

70 See *Bailey v. Alabama*, 219 U.S. 219, 245 (1911).

71 235 U.S. 151 (1914).

72 See *id.* at 163–70.

73 See ALSCHULER, *supra* note 28, at 56.

74 *Id.* (internal quotation marks omitted).

75 *Id.* (quoting 1 MERLO J. PUSEY, CHARLES EVANS HUGHES 291 (1951)).

property rights.⁷⁶ The case turned on whether the state's claimed police power interests in promoting public health and property values, and in preventing racial violence, were sufficient to overcome the segregation law's infringement on these rights.⁷⁷

Progressive sentiment, even among those who opposed residential segregation on policy grounds, overwhelmingly favored upholding the law as a social experiment well within the police power.⁷⁸ Consistent with this sentiment, Justice Holmes drafted an opinion upholding the law as a proper police power measure.⁷⁹ None of the other eight Justices was willing to join him. Ultimately the opinion sat in Holmes's private papers, undelivered. What motivated Justice Brandeis to decline to join Holmes's draft in *Buchanan* is unclear; as a Louisville native, Brandeis likely took a particular interest in the case.

Buchanan was an important case for a variety of reasons.⁸⁰ Not least, it marked a turning point in the Court's jurisprudence on the rights of African Americans.⁸¹ According to one tally, the Supreme Court heard twenty-eight cases involving African Americans and the Fourteenth Amendment between 1868 and 1910.⁸² Of these, African Americans lost twenty-two.⁸³ However, between 1920 and 1943, African American Supreme Court litigants won twenty-five of twenty-seven Fourteenth Amendment cases.⁸⁴

While Brandeis failed to write any majority opinions dealing with racial issues, he did not try to impede the Court's emerging civil rights jurisprudence the way Holmes did in *McCabe*. If, counterfactually, Justice Brandeis had joined a published Holmes dissent in *Buchanan*, it might have associated Progressive jurisprudence strongly with acquiescence to Jim Crow. If the two

76 245 U.S. 60, 61 (1917).

77 For a discussion of these rationales and their sufficiency in regard to the police power, see BERNSTEIN, *supra* note 16, at 68–78.

78 See, e.g., HOWARD LEE MCBAIN, *THE LIVING CONSTITUTION* 78–79 (1927); George D. Hott, *Constitutionality of Municipal Zoning and Segregation Ordinances*, 33 W. VA. L.Q. 332, 348–49 (1927); Arthur T. Martin, *Segregation of Residences of Negroes*, 32 MICH. L. REV. 721, 731 (1934); Comment, *Unconstitutionality of Segregation Ordinances*, 27 YALE L.J. 393, 393–97 (1918); Note, *Constitutionality of Segregation Ordinances*, 16 MICH. L. REV. 109, 111 (1917); Note, *Race Segregation Ordinance Invalid*, 31 HARV. L. REV. 475, 477–78 (1918).

79 See ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., *THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910–21*, at 592–93 illus. pp. 6–7 (1984) (providing a photoduplicated reprint of Holmes's undelivered dissent in *Buchanan v. Warley*).

80 For an elaboration of those reasons, see David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797 (1998).

81 See BERNARD H. NELSON, *THE FOURTEENTH AMENDMENT AND THE NEGRO SINCE 1920*, at 9–15 (photo. reprint 1967) (1946); see also UROFSKY, *supra* note 29, at 639 (identifying *Buchanan* as “the first major race case” after Brandeis joined the Court, which was one of several major cases where “the Court upheld black petitioners”).

82 NELSON, *supra* note 81, at 13.

83 *Id.* at 13–14.

84 See *id.* at 162. Of course, numbers don't tell the entire story, but it seems clear that the Supreme Court became a much more favorable venue for African American litigants after *Buchanan* than it had been previously.

Justices most admired by Progressives had dissented in *Buchanan*, it might also have called *Buchanan*'s precedential authority into question when a Progressive/liberal majority took over the Supreme Court. *Buchanan* was already a shaky precedent because the case was a due process liberty of contract and property rights opinion, not an equal protection opinion—and substantive protection of “economic” rights soon fell out of the Supreme Court's favor.

But because Holmes and Brandeis ultimately joined a unanimous *Buchanan* opinion, future liberal Supreme Court Justices were able to cite *Buchanan* favorably in such notable opinions as *Shelley v. Kraemer*⁸⁵ and *Bolling v. Sharpe*,⁸⁶ and do so without trepidation that they were citing an opinion supported only by “conservative” Justices who favored liberty of contract and property rights opposed by the Court's Progressives. This does not mean that *Shelley* and *Bolling* would have come out differently but for *Buchanan*. It does, however, mean that the Court in those cases had a useful precedent to rely on to proactively rebut claims that their decisions were unprecedented and therefore less legitimate.

B. Civil Liberties Under the Due Process Clause

Chief Justice Taft assigned authorship of the Court's seminal civil liberties opinions in *Meyer v. Nebraska*,⁸⁷ *Pierce v. Society of Sisters*,⁸⁸ and *Farrington v. Tokushige*⁸⁹ to Justice James McReynolds. Unlike many of Justice Brandeis's Progressive allies, however, Brandeis supported this jurisprudence. And unlike Justice Holmes, who dissented in *Meyer*, Brandeis voted with McReynolds in each of these cases.

Meyer involved a Nebraska law banning the teaching of foreign languages in school. The law, which had origins in both World War I-inspired nativism⁹⁰ and Progressive efforts to use the educational system to homogenize the population,⁹¹ was a precursor to efforts to entirely ban private schooling. The Court issued a seven-to-two opinion invalidating the law, with Justice Holmes dissenting, joined by Justice Sutherland.⁹²

Justice Brandeis joined the majority even though he supported limiting the Due Process Clause to procedural matters, or even repealing it entirely. Brandeis thought that educational freedom and other personal liberties should be given at least as much weight as the economic concerns to which

85 334 U.S. 1, 10 n.6 (1948).

86 347 U.S. 497, 499 (1954).

87 262 U.S. 390 (1923).

88 268 U.S. 510 (1925).

89 273 U.S. 284 (1927).

90 See WILLIAM G. ROSS, *FORGING NEW FREEDOMS* 74–81, 92–95 (1994).

91 See KERSCH, *supra* note 8, at 257.

92 Brandeis apparently tried to persuade Holmes not to dissent in *Meyer v. Nebraska*, but was unsuccessful. See STRUM, *supra* note 26, at 322.

the Clause had previously been applied.⁹³ Since the Court's majority insisted on applying the Clause to substantive matters at all, he insisted that what he saw as fundamental liberties should be among those protected. Biographical idiosyncrasies also may have played a role in Brandeis's decision to join the majority; as a child, he attended a German-language elementary school co-founded by his father.⁹⁴

Progressives normally allied with Brandeis were critical of the majority opinion in *Meyer*. Felix Frankfurter, for example, wrote to Judge Learned Hand that while he regarded "such know-nothing legislation as uncivilized," he would still have voted with Holmes rather than "lodging that power in those nine gents at Washington."⁹⁵ Hand agreed, and added that "I can see no reason why, if a state legislature wishes to make a jackass of itself by that form of Americanization, it should not have the responsibility for doing so rather than the Supreme Court."⁹⁶ Frankfurter effusively praised Holmes's dissent in the companion case of *Bartels v. Iowa*,⁹⁷ even inaccurately giving Holmes credit for voting to uphold legislation he opposed.⁹⁸ Many years later, Frankfurter, by then a Justice himself, told a Supreme Court colleague that the *Meyer* dissenters were correct.⁹⁹

Two years after *Meyer*, in *Pierce v. Society of Sisters*, the Supreme Court unanimously invalidated an Oregon law banning private schooling.¹⁰⁰ Justice Holmes this time joined the majority, perhaps because he believed that the *Meyer* precedent dictated that vote. Progressive jurists, however, continued to object to judicial interference in state and local education policies. In

93 See Urofsky, *supra* note 53, at 320. Frankfurter's notes state that he agreed with Brandeis, contrary to his letter to Hand suggesting that he would have voted the other way in *Meyer*. See *id.* Frankfurter, of course, is notorious for currying favor with the powerful, so perhaps it is not surprising that he told both Brandeis and Hand that he agreed with their respective positions.

94 See LEONARD BAKER, *BRANDEIS AND FRANKFURTER* 20–21 (1984).

95 GERALD GUNTHER, *LEARNED HAND* 322 (2011).

96 *Id.* See generally Note, *Constitutional Law—"Liberty" Under Fourteenth Amendment—Validity of Foreign Language Statutes*, 22 MICH. L. REV. 248, 251 (1924) (accusing the majority of reverting to an "individualism now rather generally discredited" and praising Justice Holmes's approach to the Fourteenth Amendment).

97 262 U.S. 404, 412 (1923) (Holmes, J., dissenting).

98 See Felix Frankfurter, *Mr. Justice Holmes and the Constitution: A Review of His Twenty-Five Years on the Supreme Court*, 41 HARV. L. REV. 121, 153 n.84 (1927).

99 See Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 49 (1979). Harvard Law School professor (and former Brandeis clerk) Louis Jaffe enunciated his own pro-judicial restraint objection to *Meyer* as late as 1966. See Louis L. Jaffe, Professor, Harvard Law Sch., Was Brandeis an Activist?, Address Before the University of Louisville School of Law (Jan. 28, 1966), in FIFTIETH ANNIVERSARY CONVOCATION OF JUSTICE BRANDEIS' APPOINTMENT TO THE SUPREME COURT OF THE UNITED STATES 6, 13 (Student Bar Assoc., Univ. of Louisville Sch. of Law ed., 1966).

100 268 U.S. 510, 530–36 (1925).

particular, Frankfurter criticized *Pierce* in a column in *The New Republic*.¹⁰¹ Two decades later, with the benefit of hindsight, and even though the Fourteenth Amendment no longer posed a threat to labor and other Progressive legislation, Frankfurter remained hostile to *Pierce*.¹⁰²

Meyer and *Pierce* later became important precedents cited by liberal members of the Supreme Court to support aggressive judicial review of laws that interfered with what they saw as fundamental liberties.¹⁰³ Indeed, *Meyer* and *Pierce*, along with *Buchanan v. Warley*, were among the first Supreme Court opinions to hold that fundamental rights can trump assertions of valid police power concerns by the states.¹⁰⁴

If Brandeis had aligned himself with Holmes and Frankfurter, *Meyer* and *Pierce* would likely have been radioactive to Warren Court liberals. McReynolds, the Justice generally deemed the most reactionary of the Court's conservatives, wrote the opinions, and they were issued during the Court's most "conservative" period on economic issues. Instead, with Justice Brandeis in the majority in *Meyer*, and Justices Holmes and Brandeis in the majority in *Pierce*, future liberals could safely cite these cases as being within the Progressive/liberal tradition.

C. Fourth Amendment

Despite Justice Brandeis's mixed record on the Fourth Amendment, noted above,¹⁰⁵ he authored a famous and very influential dissent in the five-to-four decision in *Olmstead v. United States*.¹⁰⁶ Brandeis argued that the Fourth Amendment prohibits warrantless wiretapping.¹⁰⁷ He also wrote *Gambino v. United States*, which reaffirmed the exclusionary rule¹⁰⁸ originally adopted in *Weeks v. United States*¹⁰⁹ in 1914.

As Ken Kersch explains, Brandeis's Fourth Amendment opinions are extremely important because the Amendment had long been associated with restrictions on the government's ability to regulate and investigate business.¹¹⁰ For example, the first important Fourth Amendment case, *Boyd v.*

101 See Editorial, *Can the Supreme Court Guarantee Toleration?*, 43 NEW REPUBLIC 85, 85–87 (1925), reprinted in FELIX FRANKFURTER ON THE SUPREME COURT 174, 174–78 (Philip B. Kurland ed., 1970).

102 See GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 266 (1977).

103 See *Lawrence v. Texas*, 539 U.S. 558, 564 (2003); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

104 See David E. Bernstein, *The Conservative Origins of Strict Scrutiny*, 19 GEO. MASON L. REV. 861, 866–69 (2012).

105 See *supra* notes 38–41 and accompanying text.

106 See *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting). Justice Brandeis also encouraged Justice Holmes to write a separate dissent in *Olmstead*. See UROFSKY, *supra* note 29, at 629–32.

107 *Olmstead*, 277 U.S. at 479.

108 275 U.S. 310, 317 (1927).

109 232 U.S. 383, 398 (1914).

110 See KERSCH, *supra* note 8, at 80; see also William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 395 (1995) ("Fourth and Fifth Amendment history

United States, involved the federal government's attempt to obtain business records pertinent to a dispute over customs duties.¹¹¹ Progressives, Justice Brandeis included, strongly opposed giving businesses rights that impeded government investigations.¹¹² Moreover, Fourth Amendment jurisprudence had been propertarian, and strong property rights were anathema to Progressive supporters of the emerging regulatory state.

In *Olmstead*, Brandeis reimagined the Fourth Amendment as protecting individual privacy, autonomy, and intellectual freedom against the government.¹¹³ He emphasized the "right to be let alone," which he deemed "the most comprehensive of rights and the right most valued by civilized men."¹¹⁴ This conception of the Fourth Amendment could provide robust protections for individual citizens—including suspected criminals—from the government, while offering little solace to a Fortune 500 company facing a congressional subpoena or a massive document "request" from a government agency.

It took some time for the post-New Deal Supreme Court to utilize the Fourth Amendment to broadly protect the public against "unreasonable searches and seizures."¹¹⁵ The liberal members of the Warren Court only acted when the authority of government to intervene in private business was secured, and the imperatives of the civil rights movement impelled them to take a stand on behalf of African American criminal defendants facing a hostile legal system.¹¹⁶

The idea of using the Fourth Amendment to protect suspected criminals was hardly original to Brandeis.¹¹⁷ The non-Progressive Justices who fought against Prohibition's excesses frequently sought to use the Amendment in ways that would protect suspected bootleggers and others who ran afoul of Prohibition enforcement. But the liberal narrative that came to dominate the legal history of the pre-New Deal period failed to recognize any positive contributions by Butler, McReynolds, and other "conservatives."¹¹⁸

Instead, when the liberal Warren Court chose to revive the Fourth Amendment as a check on state criminal procedure, it sought precedent writ-

thus has more in common with the First Amendment and *Lochner v. New York* than with criminal procedure as we know it today." (footnote omitted)).

111 See *Boyd v. United States*, 116 U.S. 616, 617–18 (1886).

112 See KERSCH, *supra* note 8, at 19–20, 56–59; Robert E. Mensel, *The Antiprogressive Origins and Uses of the Right to Privacy in the Federal Courts 1860–1937*, 3 FED. CTS. L. REV. 109, 113–14 (2009) (noting Brandeis's view). The Fourth Amendment was used this way as late as 1936, over an apoplectic dissent by Justice Cardozo, joined by fellow Progressives Brandeis and Stone. See *Jones v. SEC*, 298 U.S. 1, 27–28 (1936); *id.* at 29–33 (Cardozo, J., dissenting).

113 See KERSCH, *supra* note 8, at 80.

114 *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

115 U.S. CONST. amend. IV.

116 See KERSCH, *supra* note 8, at 58.

117 Justices Butler and McReynolds were strong advocates of broad Fourth Amendment protections for suspects in Prohibition cases. See KENNETH M. MURCHISON, *FEDERAL CRIMINAL LAW DOCTRINES* 74–82 (1994).

118 See KERSCH, *supra* note 8, at 33.

ten by a Progressive Justice in a non-corporate case. And that, along with Brandeis's brilliant rhetoric, turned *Olmstead* into a canonical Fourth Amendment case. Meanwhile, by articulating a broad right to "be let alone," Brandeis's *Olmstead* opinion also planted the seeds of the due process right to privacy the Supreme Court recognized in *Griswold v. Connecticut*.¹¹⁹

D. Freedom of Speech

While Progressives had varying views about the scope and importance of freedom of speech, through the late 1910s, there was widespread agreement that legal protection for freedom of speech should not be pursued through the courts. Judicial protection of freedom of speech ran contrary to Progressive hostility to judicial review, to natural rights, and to the notion that the political process must be tempered lest it threaten individual liberty. Progressive political scientist Edward S. Corwin, for example, criticized the nascent "clear and present danger" doctrine in 1920.¹²⁰ He wrote that "the cause of freedom of speech and press is largely in the custody of legislative majorities and of juries, which . . . is just where the framers of the Constitution intended it to be."¹²¹

Progressive critics of judicial protection of freedom of speech often drew an analogy to the hated liberty of contract doctrine. Professor Herbert Goodrich for example, argued that "the same kind of argument and the same line of thought which upholds a law which restricts a man in the contracts he may make . . . uphold[s] a law limiting the exercise of his tongue when the majority so wills it."¹²²

Not surprisingly, the Progressives' champion on the Supreme Court, Justice Holmes, initially expressed no sympathy for judicial protection for freedom of expression. As late as June 1918, Holmes told Learned Hand that free speech "'stands no differently than freedom from vaccination.'"¹²³ The Court had soundly rejected a claim for freedom from vaccination in a 1905 opinion joined by Holmes.¹²⁴

At least among Progressives who identified with the political left, wariness of judicial recognition of individualistic speech rights was tempered by the trauma of wartime repression of pacifists and other dissenters and the post-War "red scare."¹²⁵ With labor radicals, pacifists, socialists, and other left-wingers being jailed or deported, constitutional protection of freedom of

119 See *Griswold v. Connecticut*, 381 U.S. 479, 494 (1965) (Goldberg, J., concurring).

120 See Edward S. Corwin, *Freedom of Speech and Press Under the First Amendment: A Resumé*, 30 YALE L.J. 48, 55 (1920).

121 *Id.*

122 Herbert F. Goodrich, *Does the Constitution Protect Free Speech?*, 19 MICH. L. REV. 487, 500 (1921).

123 BERNSTEIN, *supra* note 16, at 99.

124 See *Jacobson v. Massachusetts*, 197 U.S. 11, 37–39 (1905).

125 GRABER, *supra* note 65, at 78; see Mark Tushnet, *The Rights Revolution in the Twentieth Century*, in 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 377, 379–80 (Michael Grossberg & Christopher Tomlins eds., 2008).

speech became an important item on the left's agenda, especially among the left's more radical elements.

Justice Holmes, pressured by young acolytes who favored judicial protection of freedom of speech, and perhaps influenced by his colleague Justice Brandeis,¹²⁶ began to articulate an increasingly speech-protective understanding of the First and Fourteenth Amendments. But Brandeis, not Holmes, turned out to be the Court's strongest proponent of freedom of speech. For example, in 1920, in *Gilbert v. Minnesota*, Justice Holmes joined the majority in upholding a state law penalizing interference with or discouragement of enlistment in the military.¹²⁷ Justice Brandeis argued in dissent that the Fourteenth Amendment protected the freedom "to teach, either in the privacy of the home or publicly, the doctrine of pacifism."¹²⁸ A year later, it was Brandeis who persuaded Holmes to dissent in *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*.¹²⁹

The rest of the Supreme Court also became increasingly supportive of freedom of speech.¹³⁰ In 1925 in *Gillow v. New York*, the Court recognized that speech was one of the rights protected against arbitrary state action by the Due Process Clause of the Fourteenth Amendment.¹³¹ The majority's conception of the scope of freedom of speech, however, remained largely traditionalist in nature. Freedom of speech did not overcome ancient common law restrictions on speech. More generally, laws that impinged on freedom of expression were subject to the same sort of standard police power analysis that had limited liberty of contract and other rights.

Meanwhile, consistent with their opposition to constitutional individualism, leading Progressive defenses of freedom of expression, such as Zechariah Chafee's, relied on utilitarian considerations and not on freedom of expression as a fundamental individual right.¹³² The Progressive identification of freedom of speech as a *civil* liberty was intended to differentiate it from what Progressives understood to be the obsolete, individualist, natural-rights based liberties of the American past.¹³³ While activist government was inimical to such rights as liberty of contract and property rights, it arguably

126 See Brad Snyder, *The House That Built Holmes*, 30 LAW & HIST. REV. 661, 713–14 (2012) (documenting the influence of Brandeis on Holmes).

127 See *Gilbert v. Minnesota*, 254 U.S. 325, 332–34 (1920).

128 *Id.* at 343 (Brandeis, J., dissenting).

129 255 U.S. 407 (1921); see STEPHEN M. FELDMAN, *FREE EXPRESSION AND DEMOCRACY IN AMERICA* 284 (2008) ("In fact, Holmes admitted that he originally planned to vote to uphold the conviction in *Milwaukee Social Democratic*; Brandeis persuaded him to dissent.").

130 This also caused a virtuous circle—once the Court suggested that it would protect speech, more speech cases started turning up on its docket, which in turn gave the Court opportunities to expand the scope of speech protections. The author thanks Mel Urofsky for raising this point.

131 See *Gillow v. New York*, 268 U.S. 652, 666, 672 (1925).

132 See, e.g., ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* (1941); Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 958–59 (1919).

133 BERNSTEIN, *supra* note 16, at 99; see JOHN FABIAN WITT, *PATRIOTS AND COSMOPOLITANS* 157–59, 190–96 (2007).

buttressed a Progressive case for freedom of speech. According to Progressive advocates of constitutional protection for freedom of expression, the more active a role played by government, the more important it is to ensure that public policy is subject to vigorous and uninhibited debate. Such debate not only could bring important considerations to light, but also could serve as a check on those who would use public power for private gain.

In 1927, Justice Brandeis penned an extraordinarily influential concurrence supporting constitutional protection for freedom of speech in *Whitney v. California*.¹³⁴ One scholar deems it “arguably the most important essay ever written, on or off the bench, on the meaning of the first amendment.”¹³⁵ Consistent with his Progressivism, Brandeis defended freedom of speech primarily on the instrumental ground that it promoted free and rational public discussion, essential for the American people to govern themselves. By focusing on the social interest in democratic self-government, Brandeis attempted to “cleanse” freedom of speech from “any lingering overtones of the doctrine of ‘liberty of contract’” and other traditional assertions of natural rights against the government.¹³⁶

By segregating speech rights from other rights protected by the so-called *Lochner* era Supreme Court, Brandeis helped ensure that constitutional protection for freedom of speech survived the sweeping constitutional changes that the New Deal and Franklin Roosevelt’s appointees to the Court put in motion. Indeed, with encouragement from the Roosevelt Administration and the elite bar,¹³⁷ freedom of speech became a “preferred freedom” and the first and most important arrow in the post–New Deal Court’s civil libertarian quiver.¹³⁸

CONCLUSION

As a Justice on the Supreme Court, Louis Brandeis had a mixed record at best on civil liberties as understood in modern times, but he served as an important transitional figure between old Progressive and modern liberal constitutional jurisprudence in several ways: (1) by refusing to join Justice

134 274 U.S. 357 (1927).

135 Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 668 (1988); see also Ashutosh A. Bhagwat, *The Story of Whitney v. California: The Power of Ideas*, in CONSTITUTIONAL LAW STORIES 407, 407–08 (Michael C. Dorf ed., 2004) (discussing the extraordinary and lasting influence of *Whitney v. California*).

136 WHITE, *supra* note 60, at 140.

137 See John W. Wertheimer, A “Switch in Time” Beyond the Nine: Historical Memory and the Constitutional Revolution of the 1930s, 53 STUD. L. POL. & SOC’Y 3, 11 (2010).

138 See *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (“Freedom of press, freedom of speech, freedom of religion are in a preferred position.”); see also Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623 (1994) (exploring the origins of the jurisprudence of special protections for “preferred freedoms”); G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 327–42 (1996) (discussing the emergence of “preferred freedoms”).

Holmes's draft dissent in *Buchanan v. Warley*, he prevented Progressivism from being strongly associated with Jim Crow. In turn, this ensured that the post-World War II liberal Supreme Court could rely on *Buchanan* in *Shelley v. Kraemer* and *Bolling v. Sharpe* without concern that they were adopting an opinion supported only by the Court's discredited "conservatives"; (2) by joining the majority opinion in *Meyer v. Nebraska* and rejecting conventional Progressive wisdom that opposed *Meyer*, *Pierce*, and *Tokushige*, Brandeis prevented those precedents from being associated solely with the non-Progressive wing of the Court. This allowed modern liberals to rely on these opinions in modern "substantive due process" cases while sidestepping the charge that they were "reviving *Lochner*"; (3) Brandeis's *Olmstead* opinion interpreted the Fourth Amendment in a way that allowed it to be used by modern liberals to protect accused criminals, while giving those liberals a "Progressive" precedent to rely on when they sought to broaden Fourth Amendment protections; (4) *Olmstead* also articulated an unenumerated "right to be let alone" that modern liberals relied upon when developing the notion of a right to privacy; and (5) Brandeis's *Whitney* opinion firmly associated freedom of speech with democratic governance instead of with limited-government ideology. This was a key factor in allowing judicial protection of freedom of speech to survive the demise of liberty of contract and to thrive when a modern liberal majority took control of the Court.

In short, in cases like *Olmstead* Brandeis created Progressive civil libertarian precedents, and by joining the majority in cases like *Buchanan* and *Meyer* he prevented restrictions on governmental abuses of power from being wholly associated with the soon-to-be discredited conservative wing of the pre-New Deal Court. This made it much easier doctrinally for later generations of liberal Justices to abandon early twentieth-century Progressivism's blanket hostility to judicial review in favor of a jurisprudence favoring civil rights and civil liberties.